The CRA Prohibits Race Discrimination

The Existing Legal Authority Related to the Affirmative Obligation of the Prudential Regulatory Agencies to Incorporate Race into the CRA Examination Process

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December 2022

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The position of this brief is that existing laws and the implementing regulations for the Community Reinvestment Act (CRA) require the consideration of race discrimination in the examination process. The purpose of this paper is to document that there is an affirmative legal obligation for the prudential Federal regulators (the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board) to incorporate racial analyses as part of the examination procedures for the Community Reinvestment Act. Specifically, the obligations of the regulators include:

- **The affirmative obligation to further the Fair Housing Act;**
- **The obligation to enforce the Equal Credit Opportunity Act;**
- **The use of regular Fair Lending Act Examinations;**
- **The obligation to assess a bank's Assessment Area(s) for discrimination; and**
- **The consideration of violations of the Fair Housing Act and Equal Credit Opportunity Act as the ultimate CRA examination and rating activity.**

All of these obligations include the consideration of race.

Executive Summary

Some have put forth the spurious argument that because the text of the Act does not specifically identify the consideration of "race" that such an analysis should not be part of the examination process.[1] This review shows that the prudential regulatory agencies have been singled out for decades under the Fair Housing Act (FHA) with an affirmative obligation to protect racial groups and areas as well as the other protected classes from discrimination in the mortgage markets. Moreover, after 1974, these agencies have been responsible for protecting the racial groups and the other protected classes under the Equal Credit Opportunity Act (ECOA) which covers all aspects of credit practices including both personal and business transactions.

The prudential regulators recognize the CRA as part of a battery of civil rights laws designed to combat discrimination. The CRA regulations (both existing and as proposed under the May 5, 2022, Notice Proposed Rulemaking [NPR] by the Federal Reserve Board [Fed], the Office of the Comptroller of the Currency [OCC], and the Federal Deposit Insurance Corporation [FDIC]) create a special section in the CRA examination process to consider evidence of discrimination and other illegal acts before assigning a rating for an examination. Therefore, the prudential regulatory agencies have the clear legal authority and the affirmative obligation to consider race in the CRA examination process.

[1] Here and in all other references, "race" includes both race and ethnicity.

The prudential regulatory agencies have long established fair lending examination procedures to identify discrimination. The examination procedures cover a wide range of practices including geographic racial redlining, as well as discrimination in access to financial products and services.

Any omission of the consideration of race is due to a failure on the part of the regulators to fulfill their legal obligations in oversight and enforcement of the Fair Housing Act, the Equal Credit Opportunity Act and the Community Reinvestment Act. The sections of this brief trace these legal requirements and enforcement mechanisms in the CRA process from the passage of the Fair Housing Act to the current time.

Federal Nondiscrimination Laws under Which the Prudential Regulators Have Existing Enforcement Obligations Related to Race

Protected Classes under the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA)

The Fair Housing Act of 1968 (FHA) and the Equal Credit Opportunity Act of 1974 (ECOA) define specific protected classes. While we are focused on the affirmative obligation of the prudential regulatory agencies to enforce the FHA, it is important to note that the FHA is one of a battery of civil rights laws and that, in terms of credit-related housing transactions, citizens are protected against discrimination by both FHA and ECOA.[2]

ECOA prohibits discrimination based on:

- Race or color;
- Religion;
- National origin;
- Sex;
- Marital status;
- Age (provided the applicant has the capacity to contract);
- The applicant's receipt of income derived from any public assistance program; and
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.

The FHA of 1968 prohibits discrimination in certain "real estate-related transactions" based on:

- Race or color;
- National origin;
- Religion;
- Sex;
- Familial status; and
- Handicap status.

[2] With some limitations, the Civil Rights Act of 1866 (14 United States Statutes at Large 27-30, enacted April 9, 1866, reenacted 1870) prohibited discrimination against a natural born citizen's rights to "purchase, lease, sell, hold, and convey real and personal property" due to that person's "color or race". The Act set out lengthy sections for enforcement including by any agents of the President, though this predates the post-Depression prudential regulatory agencies' oversight of depository institutions.

Therefore, **in order to enforce ECOA and the FHA, bank examiners must directly consider these protected class characteristics, including race.**

Affirmative FHA Enforcement Requirements for the Prudential Regulatory Agencies

Affirmative Obligations Written into the Fair Housing Act

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619) declares that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[3] "Accordingly, the Fair Housing Act prohibits, among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of "race, color, religion, sex, familial status, national origin, or handicap."[4] In general, this includes but it not limited to:

- The denial of services and products;
- Differences in the terms and conditions of services and products; or
- Disparate impacts related to the provision of services and products

based on the characteristics of the applicants **or** the concentration of protected classes in an area (i.e. redlining).

As related to financial institutions, this in includes but is not limited to the prohibition of racial discrimination in:

- Lending;
- Marketing and advertising;
- Underwriting;
- Appraisal;
- The sale and purchase of loans;
- Servicing loans; and
- The availability of related services and products

based on the characteristics of the applicants **or** the concentration of protected classes in an area (i.e. redlining).

Section 808(d) of the Fair Housing Act [42 U.S.C. §3608 ((d)] as passed in 1968 stated that:

> *all executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.*

[3] See, 42 U.S.C. 3601.

[4] See, 42 U.S.C. 3604 and 3605.

This affirmative obligation clearly applies to the prudential regulatory agencies to enforce the prohibitions against racial discrimination in their supervisory and regulatory "programs and activities".

This affirmative obligation for "all executive departments and agencies" was in the original act. This affirmative obligation in the original Act existed six years before ECOA and nine years before the CRA. As a provision of Federal law, there was no legal reason to add to the FHA another redundant provision identifying this obligation. Nonetheless, Congress amended this section of the Act in 1988 to insert the phrase below in boldface:

> *all executive departments and agencies shall administer their programs and activities relating to housing and urban development* ***(including any Federal agency having regulatory or supervisory authority over financial institutions)*** *in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.* (emphasis added)

In case the regulators did not understand that §3608(d) included them, the added phrase imposed this affirmative obligation on the prudential regulators to enforce the prohibitions against race discrimination in the FHA twice in the same paragraph.

Obviously, **the prudential regulators cannot administer the Fair Housing Act affirmatively, or at all, without the direct consideration of race in their examination and oversight of the regulated institutions.** Neither can they carry out their obligations to enforce the Equal Credit Opportunity Act without the consideration of ECOA's protected classes, including race.

Executive Orders Related to the Prohibition of Discrimination by Federal Agencies

Executive Order 11063

Executive Order 11063 from President Kennedy in 1962 requires all executive agencies to operate their programs affirmatively to eliminate discrimination in all aspects of housing and development related to activities supported by Federal programs, guarantees, insurance, etc. This obligation related to federal programs predates the Fair Housing Act and the Equal Credit Opportunity Act.

Executive Order 12892

Executive Order 12892 issued by President Clinton on January 20, 1994, (upon taking office) employs yet a different means to once again reiterate the affirmative obligation on all executive agencies – including the financial regulatory agencies – to affirmatively further the Fair Housing Act. This links the enforcement of the Fair Housing Act **affirmatively** to the regulatory operations of the financial regulators again by citing the precise language of the Fair Housing Act (including the inserted phrase added by Congress in 1988 as highlighted in boldface below). Section 1 of this Order adds the text below that makes it abundantly clear that the Order applies to the regulatory and supervisory activities of the prudential regulatory agencies. It reads:

LEADERSHIP AND COORDINATION OF FAIR HOUSING IN FEDERAL PROGRAMS: AFFIRMATIVELY FURTHERING FAIR HOUSING

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.) (Act), in order to affirmatively further fair housing in all Federal programs and activities relating to housing and urban development throughout the United States, it is hereby ordered as follows:

Section 1. Administration of Programs and Activities Relating to Housing and Urban Development. 1-101.

Section 808(d) of the Act, as amended, provides that all executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the Act and shall cooperate with the Secretary of Housing and Urban Development to further such purposes. 1-102. ***As used in this order, the phrase programs and activities shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).***

At this point in time, while the regulatory agencies were busy rewriting the CRA regulations, the obligation of these agencies to specifically consider race discrimination had been codified in the Fair Housing Act of 1968, emphasized by the 1988 amendments to the Act and imposed yet a third time in Executive Order 12892.

The Prudential Regulators Recognize the CRA as Part of a Battery of Civil Rights Laws

The Notice of Proposed Rulemaking related to the CRA released jointly by the Fed, the OCC, and the FDIC in May of 2022, contains the following statement with the heading "CRA, Illegal Discrimination, and Fair Lending" under Part D of the Introduction:

> ***The CRA was one of several laws enacted in the 1960s and 1970s to address fairness and financial inclusion in access to housing and credit.*** *During this period, Congress passed the Fair Housing Act (FHA) in 1968, to prohibit discrimination in renting or buying a home, and the Equal Credit Opportunity Act (ECOA) in 1974 (amended in 1976), to prohibit creditors from discriminating against an applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age.* ***These fair lending laws provide the legal basis for prohibiting discriminatory lending practices based on race and ethnicity.*** *(*emphasis added*)*

Both the Advanced Notice of Proposed Rulemaking (ANPR) released by the Fed on September 22, 2020, and the May 2022 joint NPR follow this paragraph with references to the

development of the CRA within the context of the sibling civil rights laws. The comments from the 2020 Fed ANPR are more extensive and serve as the basis of the section below.

Quoting Governor Lael Brainard, the 2020 ANPR states that "the CRA was one of several landmark pieces of legislation enacted in the wake of the civil rights movement intended to address inequities in the credit markets".[5] The ANPR states that, "In particular, the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA) fair lending laws each include an explicit focus on discrimination on prohibited bases such as race, and the Home Mortgage Disclosure Act (HMDA) is intended to bring greater transparency to mortgage lending practices".

A quotation in the ANPR from Chairman Bernanke concerning the history of the CRA states that:

> *Public and congressional concerns about the deteriorating condition of America's cities, particularly lower-income and* ***minority neighborhoods****, led to the enactment of the Community Reinvestment Act. . . . Several social and economic factors help explain why credit to lower-income neighborhoods was limited at that time. First,* ***racial discrimination in lending undoubtedly adversely affected local communities. Discriminatory lending practices had deep historical roots****.*[6] (emphasis added)

According to the Board's language in the ANPR:

> ***Congress enacted the CRA in 1977 primarily to address economic challenges in predominantly minority urban neighborhoods that had suffered from decades of disinvestment and other inequities.*** *Many believed that systemic inequities in credit access – due in large part to a practice known as "redlining" – along with a lack of public and private investment, was at the root of these communities' economic distress.* ***Redlining occurred when banks refused outright to make loans or extend other financial services in neighborhoods comprised largely of African-American and other minority individuals, leading to discrimination in access to credit and less favorable financial outcomes even when they presented the same credit risk as others residing outside of those neighborhoods.*** *The term is widely associated with the former federal Home Owners' Loan Corporation (HOLC), which employed color-coded maps to designate its perception of the relative risk of lending in a range of neighborhoods, with "hazardous" (the highest risk) areas coded in red.* ***Redlined neighborhoods typically had a high percentage of minority residents, were overwhelmingly poor, and had less***

[5] "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose" (Jan. 8, 2020), https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm).

[6] Chairman Ben S. Bernanke, Board of Governors of the Federal Reserve System, "The Community Reinvestment Act: Its Evolution and New Challenges" (March 30, 2007), https://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm.

desirable housing *(referencing a paper from the Federal Reserve Bank of Chicago).*[7] (emphasis added)

The footnote for that paper provides the following additional quote:

> *Neighborhoods were classified based on detailed risk-based characteristics, including housing age, quality, occupancy, and prices. However, non-housing attributes such as race, ethnicity, and immigration status were influential factors as well.* ***Since the lowest rated neighborhoods were drawn in red and often had the vast majority of African American residents, these maps have been associated with the so-called practice of "redlining" in which borrowers are denied access to credit due to the demographic composition of their neighborhood***.[8] (emphasis added)

The ANPR states that:

> ***The CRA invests the Board, the FDIC, and the OCC with broad authority and responsibility for implementing the statute****, which provides the agencies with a crucial mechanism for addressing persistent systemic inequity in the financial system for LMI and* ***minority*** *individuals and communities.* ***In particular, the statute and its implementing regulations provide the agencies, regulated banks, and community organizations with the necessary framework to facilitate and support a vital financial ecosystem that supports LMI and minority access to credit and community development.*** (Emphasis added; the statement is accompanied by a reference to Chairman Bernanke's speech cited for the quote above.)

However, the ANPR also states that:

> *Even with the implementation of the CRA and the other complementary laws, the harmful legacy of redlining and other discriminatory practices too often continues to be felt. In 2016, the "wealth gap [was] roughly the same as it was in 1962, two years before the passage of the Civil Rights Act of 1964[.]"*[9] *The ANPR also references an article from the New York Times that "The black-white gap in homeownership in America has in fact changed little over the last century . . . That pattern helps explain why, as the income gap between the two groups has persisted, the wealth gap has widened by much more.*[10]

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[7] Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, Federal Reserve Bank of Chicago, "The Effects of the 1930s HOLC 'Redlining' Map" (Feb. 2019), https://www.chicagofed.org/publications/working-papers/2017/wp2017-12.

[8] Ibid.

[9] Dionissi Aliprantis and Daniel Carroll, Federal Reserve Bank of Cleveland, "What is Behind the Persistence of the Racial Wealth Gap" (Feb. 28, 2019), https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx.

[10] *The New York Times*, "How Redlining's Racist Effects Lasted for Decades" (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html (citing William

Finally, a further citation to Governor Brainard states that, "the central thrust of the CRA is to encourage banks to ensure that all creditworthy borrowers have fair access to credit, and, to do so successfully, it has long been recognized that they must guard against discriminatory or unfair and deceptive lending practices."[11]

Therefore, the entire background section of the ANPR places the CRA among the nation's critical civil rights laws. The support for this lineage is supported by quotations from former Chairman Bernanke, Governors of the Federal Reserve Board, and numerous research papers from Federal Reserve Banks with specific references to race discrimination.

If the CRA is part of the body of Federal civil rights legislation, then it must include a clear focus on the classes protected by the civil rights laws. Therefore, the Board cannot seriously place the CRA among the major civil rights laws and eliminate any formal metric focused on actual protected class characteristics.

The Fair Lending Examination Procedures of the Prudential Regulatory Agencies

Interagency Fair Lending Examination Procedures from the Federal Financial Institutions Examination Council (FFIEC)[12]

It is not as if the prudential regulatory agencies need to invent some way to consider race in their CRA exams. The existing FFIEC Interagency Fair Lending Examination Procedures define the protected classes under ECOA and the FHA and then prescribe the methods to be used to detect violations of these acts. All of the prudential regulatory agencies engage in examining their covered institutions for compliance with the FHA as well as compliance with ECOA for all banks with $10 billion or less in assets.[13] As is clear in the citations below, this already commits these regulatory agencies to

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J. Collins and Robert A. Margo, "Race and Home Ownership from the End of the Civil War to the Present" (Nov. 2010).

[11] Governor Lael Brainard, "Strengthening the Community Reinvestment Act: What are We Learning?" (Feb. 1, 2019), https://www.federalreserve.gov/newsevents/speech/brainard20190201a.htm.

[12] This examination manual was issued in August of 2009. At that time, it included the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the National Credit Union Administration, and the Office of Thrift Supervision (which has subsequently been eliminated). The procedures are still in effect.

[13] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 gave the Consumer Financial Protection Bureau (CFPB) the responsibility of examining the largest banks (those with over $10 billion in assets) for compliance with 14 consumer laws, including ECOA, but **not** including the FHA. The **CFPB Supervision and Examination Manual** provides the following statement related to fair lending examinations at the beginning of the section on ECOA (at page 833 of the PDF version last updated in February 2022):

> *For fair lending scoping and examination procedures, the CFPB is temporarily adopting the FFIEC Interagency Fair Lending Examination Procedures that are referenced in the examination program. However, in applying those procedures the CFPB takes into account that the Fair Housing Act (FHAct), 42 U.S.C. 3601 et seq., unlike ECOA, is not a "Federal consumer financial law" as defined by the Dodd-Frank Act for which the CFPB has supervisory authority.*

the specific consideration of race and other protected classes in a detailed examination process. If done properly and thoroughly, these exams should provide the regulatory agencies with evidence of discriminatory behavior in themselves.

The guide begins with a statement on the protected classes and then several background statements including:

> *Under the ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction, and under both the ECOA and the FHAct, it is unlawful for a lender to discriminate on a prohibited basis in a residential real-estate-related transaction. Under one or both of these laws, a lender may not, because of a prohibited factor*
>
> - *Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards*
> - *Discourage or selectively encourage applicants with respect to inquiries about or applications for credit*
> - *Refuse to extend credit or use different standards in determining whether to extend credit*
> - *Vary the terms of credit offered, including the amount, interest rate, duration, or type of loan*
> - *Use different standards to evaluate collateral*
> - *Treat a borrower differently in servicing a loan or invoking default remedies*
> - *Use different standards for pooling or packaging a loan in the secondary market.*
>
> *A lender may not express, orally or in writing, a preference based on prohibited factors or indicate that it will treat applicants differently on a prohibited basis. A violation may still exist even if a lender treated applicants equally.* (at page ii)

The guide also adds that:

> *A lender may not discriminate on a prohibited basis because of the characteristics of …the present or prospective occupants of either the property to be financed or the characteristics of the neighborhood or other area where property to be financed is located.* (at page ii)

The examination procedures require the comparison of protected and non-protected classes within a broad range of banking practices as listed in the Table of Contents for the guide shown below:

FFIEC Specific Examination Guidelines Related to Racial Redlining

Each procedure is defined by specific activities. For example, **under the section on "redlining", these activities indicate how this issue involves a broad range of activities and not simply the exclusion of minority areas from the service area.** The exam procedures identify 12 potential indicators of redlining that need to be reviewed in the examination. As reproduced below, each factor contains a reference to differences in products, services, or treatment specifically related to high concentrations of minorities:[14]

> *R1. *Significant differences, as revealed in HMDA data, in the number of applications received, withdrawn, approved not accepted, and closed for incompleteness or loans originated in those areas in the institution's market that have relatively high concentrations of minority group residents compared with areas with relatively low concentrations of minority residents.*
> *R2. *Significant differences between approval/denial rates for all applicants (minority and non-minority) in areas with relatively high concentrations of minority group residents compared with areas with relatively low concentrations of minority residents.*
> *R3. *Significant differences between denial rates based on insufficient collateral for applicants from areas with relatively high concentrations of minority residents and those areas with relatively low concentrations of minority residents.*
> *R4. * Significant differences in the number of originations of higher-priced loans or loans with potentially negative consequences for borrowers, (i.e., non-traditional mortgages, prepayment penalties, lack of escrow requirements) in areas with relatively high concentrations of minority residents compared with areas with relatively low concentrations of minority residents.*
> *R5. Other patterns of lending identified during the most recent CRA examination that differ by the concentration of minority residents.*
> *R6. Explicit demarcation of credit product markets that excludes MSAs, political subdivisions, census tracts, or other geographic areas within the institution's lending*

[14] The guide identifies each redlining risk factor with an "R" and the guide contains the following note: "For risk factors below that are marked with an asterisk (*), examiners need not attempt to calculate the indicated ratios for racial or national origin characteristics when the institution is not a HMDA reporter. However, consideration should be given in such cases to whether or not such calculations should be made based on gender or racial-ethnic surrogates."

market or CRA assessment areas and having relatively high concentrations of minority residents.
R7. Difference in services available or hours of operation at branch offices located in areas with concentrations of minority residents when compared to branch offices located in areas with concentrations of non-minority residents.
R8. Policies on receipt and processing of applications, pricing, conditions, or appraisals and valuation, or on any other aspect of providing residential credit that vary between areas with relatively high concentrations of minority residents and those areas with relatively low concentrations of minority residents.
R9. The institution's CRA assessment area appears to have been drawn to exclude areas with relatively high concentrations of minority residents.
R10. Employee statements that reflect an aversion to doing business in areas with relatively high concentrations of minority residents.
R11. Complaints or other allegations by consumers or community representatives that the institution excludes or restricts access to credit for areas with relatively high concentrations of minority residents. Examiners should review complaints against the institution filed either with their agency or the institution; the CRA public comment file; community contact forms; and the responses to questions about redlining, discrimination, and discouragement of applications, and about meeting the needs of racial or national origin minorities, asked as part of obtaining local perspectives on the performance of financial institutions during prior CRA examinations.
R12. An institution that has most of its branches in predominantly non-minority neighborhoods at the same time that the institution's sub-prime mortgage subsidiary has branches which are located primarily in predominantly minority neighborhoods. (at pages 10-11 – emphasis added for factors related to consumer complaints and differences in banking services)

Examples from the Comptroller's (OCC) Handbook for Fair Lending Examinations[15]

The examination handbooks for each regulatory agency essentially mirror or repeat the interagency procedures. Below are examples from the procedures for the Comptroller of the Currency. The outline for conducting a fair lending examination from the **Comptroller's Handbook for Fair Lending** compliance indicates how **race is specifically to be investigated both in the treatment and impacts on individuals of different races and in terms of geographic discrimination in terms of the many facets of "redlining"**:

The Table of Contents for the **Handbook** is essentially the same as that in the interagency procedures:[16]

[15] See, Federal Deposit Insurance Corporation, **FDIC Consumer Compliance Examination Manual – Part IV Fair Lending**, March 2021, for comparable procedures for the FDIC. The Federal Reserve Board uses training and tools that are based on the **FFIEC Interagency Fair Lending Procedures**.

[16] Office of the Comptroller of the Currency, **Fair Lending, Comptroller's Handbook**, January 2010 (notes on the handbook indicate updates past 2010).

OCC Specific Examination Guidelines Related to Racial Redlining

The section on Redlining repeats the 12 potential indicators of redlining contained at pages 29-31 of the interagency procedures. Also repeating language from the interagency procedures, the **Handbook** states:

> *Neither the Equal Credit Opportunity Act (ECOA) nor the Fair Housing Act (FHAct) specifically uses the term "redlining." However, federal courts as well as agencies that have enforcement responsibilities for the FHAct have interpreted redlining as prohibiting a bank from having different marketing or lending practices for certain geographic areas, compared with others, when the purpose or effect of such differences would be to discriminate on a prohibited basis. Similarly, the ECOA would prohibit treating applicants for credit differently on the basis of differences in the racial or ethnic composition of their respective neighborhoods.* (at page 56).

Continuing with comparable language from the interagency procedures the **Handbook** describes redlining in the following language:

> *Traditional "redlining" is a form of illegal disparate treatment in which a bank provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located. The practice of targeting certain applicants or areas with less advantageous products or services based on prohibited characteristics may also constitute redlining.*[17] *The redlining analysis may be applied to determine whether, on a prohibited basis:*
>
> - *A bank fails or refuses to extend credit in such an area;*

[17] In the **FFIEC Interagency Fair Lending Examinations Procedures**, this sentence is replaced with "Redlining may also include 'reverse redlining,' the practice of targeting certain borrowers or areas with less advantageous products or services based on prohibited characteristics." (at page 30).

- *A bank targets certain borrowers or certain areas with less advantageous products;*
- *A bank makes loans in such an area but at a restricted level or upon less-favorable terms or conditions as compared with contrasting areas; or,*
- *A bank omits or excludes such an area from efforts to market residential loans or solicit customers for residential credit.* (at page 56)

In describing the redlining analysis to be undertaking in an examination, the **Handbook** states:

> *Overt evidence is relatively uncommon. Consequently, the redlining analysis usually will focus on comparative evidence (similar to analyses of possible disparate treatment of individual customers) in which the bank's treatment of areas with contrasting racial or national origin characters is compared.* (at page 57)

Then the **Handbook** defines six steps to be taken in an analysis to consider racial redlining:

1. *Identify and delineate any areas within the bank's CRA assessment area and reasonably expected market area for residential products that have a racial or national origin group character;*
2. *Determine whether any area identified in step 1 appears to be excluded, under-served, selectively excluded from marketing efforts, or otherwise less-favorably treated in any way by the bank;*
3. *Identify and delineate any areas within the bank's CRA assessment area and reasonably expected market area for residential products that are of a particular racial or national origin group character and that the bank appears to treat more favorably;*
4. *Identify the location of any racial or national origin group areas located just outside the bank's CRA assessment area(s) and reasonably expected market area for residential products that may have been purposely excluded by the bank;*
5. *Obtain the bank's explanation for the potential difference in treatment between the areas and evaluate whether it is credible and reasonable; and*
6. *Obtain and evaluate other information that may support or contradict interpreting identified disparities to be the result of intentional illegal discrimination.* (at page 57-58)

These are the same steps that are defined in the interagency procedures. Under these procedures the fair lending examination specifically reviews the CRA assessment area for indications that it excludes areas of high minority concentrations (highlighted in boldface as factor R9 in the citation from the interagency procedures above). Moreover, the fair lending examination specifically reviews the locations and services provided through bank branches related to minority and white areas (highlighted in boldface as factors R7 and R12 in the citation from the interagency procedures above). In addition to the evidence gathered directly by the examiners from the bank, the procedures include the consideration of complaints from consumers and others as part of the review process (highlighted in boldface as factor R11 in the citation from the interagency procedures above).

None of these steps can be completed without the direct consideration of race. Indeed, the Handbook continues with specific instructions on how to identify racial concentrations for comparison just as the prior sections of the Handbook identify how to compare lending activities related to individuals based on protected and non-protected class characteristics.

Citations from the CRA and Regulations

From the citations above **it is clear that there is no legal need to place the consideration of race or any other protected class under the fair lending laws directly in the CRA as existing law and current fair lending examination procedures already incorporate the consideration of race into the oversight and enforcement obligations of the prudential regulatory agencies.**

The CRA added the following purpose to the responsibilities of the regulatory agencies:

§2901. Congressional findings and statement of purpose

- *The Congress finds that—*
  - *• regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;*
  - *• the convenience and needs of communities include the need for credit services as well as deposit services; and*
  - *• regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.*
- *It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.*

The Act makes the following statement concerning the examination process:

§2903. ***Financial institutions; evaluation***

(*a) In general*

In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall—

(1) ***assess the institution's record of meeting the credit needs of its <u>entire</u> community****, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and*

(2) take such record into account in its evaluation of an application for a deposit facility by such institution.[18] (emphasis added)

[18] 95-128, 91 Stat. 1147, Title VIII of the Housing and Community Development Act of 1977, 12 U.S.C. The language in both citations has remained unchanged through all amendments to the Act.

The highlighted text indicates that the covered institution must serve "its entire community". The Act adds the need to consider "low- and moderate-income neighborhoods" as an additional class that is not protected under the existing fair lending laws but is only protected under the CRA. Therefore, unlike the consideration of race, the consideration of credit and banking services to these areas needed to be placed directly in the text of the law, in the regulations, and, in the examination procedures.

There have been two major versions of the CRA regulations, the original set in 1978 and a major revision in 1995.[19] These two versions have different structures and differences in the approach for evaluating performance. The original regulations focused heavily on processes, such as the assessment of the needs of the assessment area(s), the involvement of the board of directors, and the development of products designed to serve the identified needs of the assessment areas. The revised regulations sought to develop relatively uniform metrics for evaluating performance in three areas: lending, services, and investments. In spite of what may seem like fundamental differences, however, the consideration of race is embedded in each set of regulations. In both sets of regulations, the delineation of the assessment area (defined as a bank's "community") is a fundamental aspect of the examination process.

Assessment Factors from the Original 1978 Regulations Include the Specific Consideration of Discrimination

The 1978 regulations define the assessment area in terms of options for incorporating entire political areas such as metropolitan areas or counties, or in terms of arcs drawn from the bank's offices to the edge of its effective lending territory and all areas equidistant from these points. The concept was to ensure that no areas were excluded arbitrarily. In the original regulations there were twelve assessment factors. These included the following five factors:

(b) The extent of the bank's marketing and special credit-related programs to make members of the community aware of the credit services offered by the bank;

(d) Any practices intended to discourage applications for types of credit set forth in the bank's CRA statement(s);

(e) The geographic distribution of the bank's credit extensions, credit applications, and credit denials;

(f) Evidence of prohibited discriminatory or other illegal credit practices; and

(g) The bank's record of opening and closing offices and providing services at offices.[20]

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[19] Additional revisions were made in 2005 but they do not materially affect the issues in this brief. For these revisions, see, **Federal Register**: August 2, 2005 (Volume 70, Number 147), pages 44256-44270.

[20] The initial regulations for the CRA were published in the **Federal Register** October 2, 1978 (Volume 43, No. 198), at pages 47143 to 47155. Each regulatory agency had its own set of regulations, but they are identical aside

In April of 1990, after the Act was amended to provide for a public version of the evaluation of each institution, the FFIEC produced the **Interagency Guidelines for Disclosure of Written Evaluations**.[21] This included an example of how such written public evaluations would be written for banks receiving different ratings.

Examples of Noncompliance Related to Discrimination

The excerpts below from the example for a bank receiving a Substantial Noncompliance rating indicate how the assessment for the five factors noted above would be cited. **In as much as it is illegal to exclude minority areas from the assessment area, the failure to serve "all segments" of a bank's community includes all minority areas that are required to be included in the assessment area.** Therefore, the excerpts from the sample evaluation indicate how all areas, including areas of minority concentrations and all the residents and businesses within these areas, were considered in the examination process:

Under "Marketing and Types of Credit Offered and Extended" the sample reads:

> *Assessment Factor B* (at page 40)
> *The institution's marketing and advertising programs, if existent, are inadequate as they do not address the credit products directed to **all segments** of the institution's local community, including low- and moderate-income neighborhoods.* (emphasis added)

Under "Reasonableness of the Delineated Community" (at page 44) the example text reads:

> *The institution's delineated community is unreasonable and excludes low- and moderate-income neighborhoods. Institution's guidelines for defining its community need substantial revision.*
>
> *Assessment Factor E*
>
> *The geographic distribution of the institution's credit extensions, applications, and denials does, in fact, indicate unreasonable lending patterns inside and outside its delineated community, particularly in low- and moderate-income communities.*
>
> *Assessment Factor G*
>
> *There is limited accessibility to the institution's offices for certain segments of its local community, particularly low- and moderate-income neighborhoods.*

Under "Discrimination and Other Illegal Credit Practices", the sample text reads:

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from technical references to each agency. Excerpts are taken from the version for the Comptroller of the Currency (12 CFR Part 25).

[21] The CRA was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to require a form of the examination to be disclosed to the public. The excerpts are taken from a copy of the guide reproduced as Appendix D-1 of **The Community Reinvestment Act (CRA) Handbook**, 1991 Fourth and Revised Edition, by the National Training and Information Center (the research arm of National People's Action) for use by community groups in developing reinvestment programs to counter redlining and disinvestment.

Assessment Factor D (at page 47)

*Available data indicate that the institution rarely, if ever, considers credit applications from **all segments of its local community**. The volume of applications from low- and moderate-income neighborhoods is very low or non-existent.* (emphasis added)

Assessment Factor F (at page 48)

The institution is in substantial noncompliance with antidiscrimination laws and regulations including: the Equal Credit Opportunity Act, the Fair Housing Act, the Home Mortgage Disclosure Act, and any agency regulations pertaining to nondiscriminatory treatment of credit applicants.

The institution has demonstrated a pattern or practice of prohibited discrimination, or has committed a large number of substantive violations of the antidiscrimination laws and regulations. Violations may be reported from previous examinations.

In the context of the fair lending examination process, discrimination includes the treatment of minority areas or persons and businesses in minority areas in factors D and F as well.

The Exclusion of Considering Anything Not Contained in the Text of the CRA

While the term "race" is not contained in the text of the CRA, §2905 of the Act instructs the regulatory agencies to develop regulations to implement the act. The consideration of race under the obligations to affirmatively enforce the FHA and to enforce ECOA have been developed as part of these regulations for each prudential regulatory agency. It would be absurd to require the CRA, or any act, to specifically include every term of every act related to its authority for implementation. That is the purpose of the authority for the agencies to create implementing regulations. Presumably, what critics of the consideration of race must mean, therefore, is that the civil rights laws (FHA and ECOA) that contain the specific considerations of race are not in the text of the CRA. Indeed, the text of the Act does not contain the terms:

- The Fair Housing Act;
- The Equal Credit Opportunity Act;
- The Truth in Lending Act
- The Home Ownership and Equity Protection Act
- The Federal Trade Commission Act
- The Real Estate Settlement Procedures Act;
- The Military Lending Act; or
- The Servicemembers Civil Relief Act.

Are the agencies prohibited from the consideration of any violations of any of these acts because they are not specifically included in the text of the CRA? That would mean that a bank could receive an Outstanding rating in spite of massive violations of any or all of these acts in all aspects of its activities and operations with impunity as related to the CRA.

Moreover, the text of the CRA does not include the following terms:

- Assessment Area;
- Lending Test;
- Investment Test;
- Service Test;
- Strategic Plan;
- High Satisfactory; or
- Low Satisfactory.

The regulations invented these terms out of nothing, while the consideration of violations of the FHA, ECOA and the other financial consumer protection acts is based on established laws with a history of enforcement. If the agencies cannot consider any terms not in the text of the Act, then they somehow need to assign the ratings listed in the Act without any context, structure or evaluation whatsoever.

The 1995 Revised Regulations[22]

It is clear from the history of the CRA regulations from their first version in 1978 to the current version in 1995 that the prudential regulatory agencies understand that their inclusion of the consideration of race and violations of other consumer laws is a legitimate part of their regulatory authority to implement to goal of the Act to ensure that a bank's entire community is served fairly in its activities and operations. The original regulations contained specific rating factors to consider discrimination in the delineation of a bank's assessment area and in its operations. The current regulations maintain those considerations albeit in a different format.

The Consideration of Discrimination in the Assessment Area

That the delineation of the community must not eliminate minority areas (i.e., redlining) was considered clear from the beginning of the law. When the regulations were revised in 1995, the section on the delineation of the assessment area allowed some flexibility in the geographic definition of the "community" but it made the civil rights intent of eliminating geographic redlining even more clear in stating:

> *§228.41(e) Limitations on the delineation of an assessment area.* ***Each bank's assessment area(s)****:*
>
> *(1) Must consist only of whole geographies;*
>
> *(2)* ***May not reflect illegal discrimination;***

[22] The revised regulations for the CRA were published in the **Federal Register** May 4, 1995 (Volume 60, No. 86), at pages 22156 to 22223. Each regulatory agency had its own set of regulations, but they are identical aside from technical references to each agency. Excerpts are taken from the version for the Federal Reserve Board (12 CFR Part 228).

(3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the bank's size and financial condition. (emphasis added)[23]

The revised statement of the delineation of the assessment area makes it even more clear that minority areas cannot be excluded. As indicated in the delineation of the assessment area and consistent with the fair lending examinations, banks may not exclude minority areas from the areas upon which the examination process is based. The 2022 proposed regulation also includes the statement that an assessment area may not reflect illegal discrimination. Minority areas and their residents and businesses are entitled to full and equal access to all the lending, investment, and banking services that are considered in the examination process.

The Special Consideration of Discrimination and Illegal Activities beyond the Lending, Service, and Investment Tests

Instead of specific assessment factors related to discrimination, the current regulations indicate that after the CRA rating has been assigned from the three tests, the regulator will consider the "effect of evidence of discriminatory or other illegal credit practices". The version of this section from the regulations for the Federal Reserve Board at §228.28(c) states:

(1) The Board's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices *in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in Sec. 228.22(a),* ***evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:***

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;

(ii) Violations of the Home Ownership and Equity Protection Act;

(iii) Violations of section 5 of the Federal Trade Commission Act;

(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and

(v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission. (emphasis added)

[23] The assessment area is incorporated into the examination process according to the following section of the regulations (using the version for the Comptroller of the Currency).

Section 25.41 Assessment Area Delineation:

(a) A bank or savings association shall delineate one or more assessment areas within which the appropriate Federal banking agency evaluates the bank's or savings association's record of helping to meet the credit needs of its community. The appropriate Federal banking agency does not evaluate the bank's or savings association's delineation of its assessment area(s) as a separate performance criterion, but the appropriate Federal banking agency reviews the delineation for compliance with the requirements of this section.

The 2022 NPR incorporates a similar version of this separate provision adapted to the NPR's more complex definitions of the assessment matrixes, assessment areas, institutional facilities included in the evaluation, and the inclusion of additional consumer laws.[24] As in the existing regulations, consideration is given to "evidence of discriminatory or other practices that violate an applicable law, rule, or regulation" including "discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act".

The revision of the CRA regulations in 1995 reorganized and restructured the assessment factors around a lending test, a service test, and an investment test. Some might mistakenly focus on the fact that there is no direct component of the three examination tests that specifically requires the direct consideration of discriminatory behavior. But the fair lending examinations continue to apply to the overall consideration of access to banking facilities and services as well as lending. These are exams that should provide evidence of discriminatory behavior identified directly by the regulatory agencies. In addition, they are supposed to include the consideration of evidence of discrimination from other sources as well, including complaints and actions by other agencies and private parties, as codified in the fair lending examination procedures.

One might note that the Dodd-Frank Act transferred the oversight of many consumer law provisions to the Consumer Financial Protection Bureau in 2010. This applies to institutions with over $10 billion in assets. As such, the CFPB rather than the prudential regulatory agencies engages in the consumer compliance examinations for these institutions. The prudential regulatory agencies are still obligated to perform the consumer compliance examinations for institutions with less than $10 billion in assets**.** Moreover, **the Dodd-Frank legislation did not transfer the oversight of the Fair Housing Act to the CFPB**. Therefore, the prudential regulatory agencies are still required to conduct the fair lending exams related to the FHA for all of their regulated institutions.

Because the regulators are to include evidence from sources other than their own examinations, the fact that the CFPB performs the consumer compliance examinations for ECOA and other consumer laws does not mean that the prudential regulators are only responsible for considering evidence of discrimination in violation of the FHA for institutions with more than $10 billion in assets. Indeed, the section below indicates how violations of consumer laws other than the FHA are taken into account in assigning the final CRA ratings.

Clearly, the regulators are specifically required to consider any evidence of discrimination and take that into account in assigning the final rating as part of the examination process. This consideration is a formal part of the CRA rating process. Seen in the larger context of the fair lending laws, the fair lending examination process, and the prohibition from excluding minority areas from the assessment area, **the consideration of evidence of discrimination as the final activity in the rating process places it above the individual assessment factors.**

[24] See, pages 540-541 of the PDF version of the NPR under what is defined as "§___.28 Assigned Conclusions and Ratings".

The Inclusion of Consumer Compliance Law Violations in the Rating CRA Process

It is also clear that the prudential regulators consider violations of many laws that are not specifically defined in the CRA. In addition to the Fair Housing Act and the Equal Credit Opportunity Act, the May 2022 NPR lists other laws that the regulators are to consider for compliance and evidence of illegal activities before making the final rating, including:

- Violations of the Home Ownership and Equity Protection Act;
- Violations of section 5 of the Federal Trade Commission Act;
- Violations of 12 U.S.C. 5531 (regarding unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services);
- Violations of section 8 of the Real Estate Settlement Procedures Act;
- Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission;
- Violations of the Military Lending Act; and
- Violations of the Servicemembers Civil Relief Act.

Indeed, reviews of the public CRA ratings indicate that violations of these acts as well as violations of the FHA and ECOA are used to adjust the final CRA rating even though they are not listed in the text of the CRA.[25] For example:

- The 2012 US Bank rating by the OCC was reduced for unfair and deceptive credit card practices;
- The 2012 Eagle Bank and Trust FDIC rating was reduced for redlining and violations of the FHA and ECOA;
- The 2012 Wells Fargo OCC rating was reduced for violations of the FHA, ECOA, the Federal Trade Commission Act, unfair and deceptive practices of the Consumer Financial Protection Act, noncompliance with the Servicemembers Credit Relief Act, and violations of the Real Estate Settlement Procedures Act;
- The 2013 BankcorpSouth FDIC rating was reduced for redlining and violations of the FHA and ECOA;
- The 2014 HSBC OCC rating was reduced for violations of the Servicemembers Credit Relief Act; and
- The 2018 Citibank OCC rating was reduced for unfair and deceptive practices related to student loans and for misconduct in servicing mortgage loans.

Therefore, the CRA examination and rating process routinely incorporates the assessment of violations of a wide range of consumer laws not included in the text of the Act. This takes place without the regulatory agencies being subjected to a legal challenge for holding the banks accountable for compliance with these laws as part of the CRA evaluation and rating process.

[25] A detailed review of fair lending law violations related to the CRA can be found in Calvin Bradford, "Violating Your Way to an Outstanding Rating: The Treatment of Racial Discrimination Cases in CRA Ratings", December 2022.

About the Inclusion of "Low- and Moderate-Income Neighborhoods" in the CRA

Those opposing the inclusion of a consideration of race often point to the fact the text of the act includes consideration of "low- and moderate-income neighborhoods" but no mention of race.[26] While the CRA is properly cited as part of a battery of civil rights laws, there are no Federal laws that define low- and moderate-income neighborhoods as a protected class. One may note that at every point where this term is used in the text of the Act, it refers not to individuals but to geographic areas. This is a unique geographic term that was included in the CRA, but that did not exist in other Federal banking and consumer laws. Had these areas not been specifically identified as a kind of protected class under the CRA, the prudential regulatory would not have the authority to create such a class and include such a class in their examination process. Therefore, the Act requires that such areas be included within the entire range of areas to be included in a bank's service area. On the other hand, the FHA and ECOA already prohibit discrimination for clearly defined protected classes and for specific activities.

The Existing Treatment of Affirmative Programs

Amendments to the CRA have created some language that specifically considers certain activities that can receive credit for their CRA performance. These are essentially affirmative action programs. These programs go beyond the assessment of compliance with existing laws. As such, they need to be written into the law. Otherwise, the prudential regulators would likely be required to justify the consideration of these programs and activities under the legal concept of "strict scrutiny" in order to demonstrate that these programs are consistent with the existing legal authority of the regulators, necessary to achieve goals consistent with the CRA legislation, respond to a well-documented need in the market, do not penalize institutions that do not engage in such activities, and are tightly tailored to correct only the specific existing market failures.

One example is the special activity defined in an amendment to the CRA that provides credit for banks providing investments, loans, and other ventures to minority- and women-owned and low-income credit unions. Under §2903 (b) of the Act, the amendment reads:

> *In assessing and taking into account, under subsection (a), the record of a nonminority-owned and nonwomen-owned financial institution, the appropriate Federal financial supervisory agency may consider as a factor capital investment, loan participation, and other ventures undertaken by the institution in cooperation with minority- and women-owned financial institutions and low-income credit unions provided that these activities*

[26] See for example, §2903. Financial institutions; evaluation:

(*a) In general*

In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall:

(1) assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and

(2) take such record into account in its evaluation of an application for a deposit facility by such institution.

help meet the credit needs of local communities in which such institutions and credit unions are chartered.

A second such program provides credit for majority-owned institutions that sell, rent, or donate facilities for use by minority- and women-owned institutions. Under §2907 (a) of the Act the amendment reads:

In the case of any depository institution which donates, sells on favorable terms (as determined by the appropriate Federal financial supervisory agency), or makes available on a rent-free basis any branch of such institution which is located in any predominantly minority neighborhood to any minority depository institution or women's depository institution, the amount of the contribution or the amount of the loss incurred in connection with such activity may be a factor in determining whether the depository institution is meeting the credit needs of the institution's community for purposes of this chapter.

It is important to note that these provisions represent special purpose programs that banks are not required to make and that are considered as extra credit for those institutions that report these activities. They are not meant to counter substantive violations of civil rights or consumer laws. They are not part of - or a replacement for - the affirmative obligation of the regulatory agencies to enforce the provisions of the Fair Housing Act, the Equal Credit Opportunity Act, or the provisions of the Community Reinvestment Act that apply to all persons and businesses served by the banks.

Fair Lending Compliance Is Not About Affirmative Programs

The section above describes the use of affirmative action programs in the CRA evaluation process. In administering their programs in the enforcement of the FHA and ECOA, the prudential regulators are **not** engaged in special affirmative action programs. Their fair lending examinations and their consideration of the FHA and ECOA violations are about compliance with the provisions of established laws. The affirmative obligation placed on the regulatory agencies under the FHA is about being active in enforcing the existing provisions of the FHA and not about creating activities that go beyond the enforcement of the compliance with the Act. Violations of the FHA and ECOA are about failing to comply with the fundamental requirements of these civil rights acts and engaging in illegal discrimination **against** protected classes and not creating special affirmative programs.

The obligation for the prudential regulatory agencies to include the consideration of racial discrimination:

- Predates the CRA in the FHA;
- Predates the CRA in ECOA;
- Is emphasized again in the FHA amendments of 1988;
- Is made crystal clear again in Executive Order 12892;

- Is implemented in the regulators' Fair Lending Examination Process; and
- Is Incorporated into the CRA Examination and Rating Process as a fundamental consideration in the definition of Assessment Areas and as the final consideration before assigning a rating.

As noted in the body of this brief, if the CRA is part of the battery of Federal civil rights legislation, then it must include a clear focus on the classes protected by the civil rights laws. **The prudential regulators cannot administer the Fair Housing Act affirmatively, or the FHA and ECOA at all, without the direct consideration of race in their examination and oversight of the regulated institutions.**

No act of Congress or the Federal courts has eliminated the consideration of race by the agencies. In order to justify the exclusion of race from the affirmative obligations in the CRA Congress would need to:

- **Amend the Fair Housing Act;**
- **Amend the Equal Credit Opportunity Act;**
- **Prohibit the consideration of race in the Fair Lending Exams; and**
- **Prohibit the consideration of race in the CRA Regulations.**

A Note on the Claim that a Legal Challenge to the Inclusion of Race in the CRA Would Eliminate the CRA Altogether

Those who claim that race cannot be included for direct consideration in the CRA examination and rating process often raise the specter that a lawsuit challenging the use of race in the CRA would likely eliminate the CRA altogether. But, if the courts decided that race could not be directly considered in the CRA examination and the rating process, the legal result should be that the law would stand but the examination procedures in the regulations could not include race (including violations of the FHA, ECOA, or the arbitrary elimination of communities from an assessment area based on the racial composition of the areas). While this would negate the history and blatantly ignore the purpose of the CRA for banks to serve their "entire community", it would not eliminate the CRA itself. In fact, it would leave it exactly as these critics claim it should be now, where no level of FHA or ECOA violations would have any impact on a bank's CRA examination and rating while the obligation to serve low- and moderate-income communities would continue.

One notes that even in the Supreme Court's case of *West Virginia v. EPA* which some have criticized as clear judicial overreach, the decision eliminated crucial regulations but left the remainder of the law and regulations intact. Given the extremely poor record of the enforcement against discrimination by the regulators, little may be changed by such a ruling on the CRA and race.

Such a ruling to eliminate the direct consideration of race in the CRA, however, would leave the door open to the kind of fair lending processes proposed by Relman Colfax and the National Community Reinvestment Coalition (NCRC) in its paper Adding Robust Consideration

of Race to Community Reinvestment Act Regulations.[27] This proposal recommends a regular set of large-scale investigations of racial disparities by Federal Reserve economists to establish a claim of documented discrimination that could be used to incorporate race in selected markets in line with the kinds of affirmative actions that could be justified to overcome established and ongoing evidence of discrimination. The Relman/NCRC proposal suggests that this process would likely meet the "strict scrutiny" standards that the courts use to permit limited and narrowly targeted consideration of race when it is not supported directly in the relevant law.

Even if this proposal could theoretically meet the requirements to withstand the legal challenges of strict scrutiny that allow for affirmative considerations of race it would face considerable practical challenges. For example, it would require virtually annual research and investigations of racial discrimination in every market area in the nation. This would require a massive increase in Federal Reserve or other regulatory agency economists. An even more daunting challenge is that it would require a conclusion by the researchers that race, and not other actors, demonstrably explains the disparities identified in the analyses.

While various researchers at the Federal Reserve and other regulatory agencies have identified significant racial disparities, one works hard to find a study that concludes that these disparities indicate race discrimination. The most common conclusion follows language similar to a recent study by an FDIC economist that reads:

> *Therefore, one cannot interpret differences identified in this paper as evidence of racial discrimination by individual lenders, as these differences could be due to unobserved credit quality factors or unobserved differences in the non-discretionary standards lenders use for loan decisions. Rather, the results should help researchers identify where racial lending differences remain and where future research may prove fruitful in identifying underlying causes.*[28]

An alternative approach that would face significant political challenges today would be for Congress to amend the CRA to include the consideration of race in the text of the Act. This would impose the obligation for the prudential regulators to consider race in the CRA process for at least the fourth time. Meanwhile, holding the banks accountable for race discrimination would remain primarily where it has always been, in the hands of private actions by civil rights and fair housing groups, state actions, DOJ, HUD, or the CFPB.

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[27] See Brad Bower, Josh Silver, Jason Richardson, Glenn Schlactus, and Sacha Markano-Stark, *Adding Robust Consideration of Race to Community Reinvestment Act Regulations: An Essential and Constitutional Proposal*, Relman Colfax PLLC and The National Community Reinvestment Coalition, November 2021 found at https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/.

[28] See, Stephen J. Popick, "Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? - A Study Using 2020 Expanded HMDA Data", Working Paper Series, Federal Deposit Insurance Corporation Center for Financial Research, June 2022, page 16.

A Conclulding Question on the Failure of the Regulators to Hold Banks Accountable for Fair Lending Complaince

This brief provides extensive support for the affirmative obligation on the regulators to directly consider race in the CRA examination and rating process. A separate review of fair lending law violations by this same author indicates that in the past 30 years, the Federal bank regulators failed to find 85% of the cases where banks discriminated against both individual borrowers and/or entire minority communities. The banking agencies failed to find 91% of the redlining cases where banks cut minority areas out of their service areas, failed to make loans to minorities in their service areas, or reduced or failed to locate branches in the minority areas in their service areas. In almost all of these redlining cases, maps made this discrimination vividly clear by showing the service areas, the location of bank branches, or the location of loans compared to the racial composition of the areas. Yet even in these mapping cases, the regulatory agencies failed to find the discrimination the same 91% of the time. The review of these cases shows how the regulatory agencies not only failed to find the discrimination but, in some cases, seemed to work hard not to call it discrimination when it was identified.[29]

Therefore, the question we need to ask is not whether the agencies have an obligation to consider race in the CRA examination process but whether the regulators understand that the obligation has existed for decades and can explain why they are so bad at implementing it.

[29] See, Calvin Bradford, *Violating Your Way to an Outstanding CRA Rating: The Treatment of Race Discrimination Law Violations in the Community Reinvestment Act Examinations and Ratings, December 2022.*